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National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, DC 20460

RE: New Freedom of Information Act Request

Dear United States Environmental Protection Agency FOIA Staff,

This letter constitutes a Freedom of Information Act (FOIA) request by WaterLegacy for the following records of the United States Environmental Protection Agency (EPA):

- A. All comments, letters, emails, or other records from January 1, 2010 to the present reflecting EPA's communications with the Minnesota Pollution Control Agency (MPCA) with respect to the MPCA's proposed revisions of class 3 and class 4 rules.
- B. All comments, letters, emails or other records January 1, 2010 to the present reflecting EPA's communications with the United States Fish and Wildlife Service (FWS) with respect to the MPCA's proposed revisions of class 3 and class 4 rules.
- C. All internal policies, interpretative memoranda, comments in other states' rulemaking, or similar EPA records from January 1, 2008 to the present reflecting EPA's policies in considering proposed state revisions of agricultural or industrial uses and their effects on designated and existing uses.

A copy of the MPCA's current (October 28, 2020) proposed class 3 and class 4 rules is attached as a reference.

FEE WAIVER REQUEST

WaterLegacy requests a fee waiver, based on the factors listed on the FOIA Online form, for which the form provides insufficient room for a response.

Factor 1. The subject of the request: WaterLegacy's FOIA Request concerns the operations or activities of the government. The subject of the requested records is communication regarding the MPCA proposal to revise water quality standards (class 3 and class 4 rules) and the EPA's review and consultation with FWS concerning these proposed standards. The request concerns the operations of government in fulfilling responsibilities under the Clean Water Act (CWA), its implementing regulations, and the Endangered Species Act (ESA).

Factor 2. The informative value of the information to be disclosed: The records requested by WaterLegacy are likely to contribute to an understanding of government operations or activities and increase public understanding of those operations and activities. The records requested would show federal regulatory evaluation of proposed MPCA water quality standards revisions and the issues and concerns of experienced federal scientists and managers. The records would reveal the regulatory process and may also raise questions that members of the

public may not have discerned on their own. These records are not already in the public domain.

Factor 3. The contribution to an understanding of the subject by the public is likely to result from disclosure: The records requested by WaterLegacy will contribute to public understanding of issues related to MPCA's proposed water quality standards revision. WaterLegacy has the subject matter expertise, ability, and intention to effectively convey information to the public. Such information may be conveyed, depending on the content of records received, in direct email communications to members of the public and allied groups, in online postings, through media releases, as a part of written comments, testimony or exhibits filed in public rulemaking, or through some combination of these communication methods.

The FOIA requires that agency must furnish records without any charge or at a reduced charge "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). *See Cause of Action v. Fed. Trade Comm'n* ("Cause of Action v. FTC"), 799 F.3d 1108, 1111 (D.C. Cir. 2015)(reversing and remanding the agency's denial of a fee waiver under the FOIA).

The FOIA waiver provision should be "liberally construed in favor of waivers for noncommercial requesters." *Southeastern Legal Found., Inc. v. United States Env't'l Prot. Div.*, 181 F. Supp. 3d 1063, 1074 (N.D. Ga. 2016); *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir.1987) (quoting 132 Cong. Rec. 27,190 (1986) (Sen. Leahy)); *Forest Guardians v. United States Dep't of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005); *Schoenman v. Fed. Bureau of Investigation*, 604 F. Supp. 2d 174, 188 (D. D.C. 2009); *Natural Res. Def. Council v. United States Env't'l Prot. Agency* ("NRDC v. EPA"), 581 F. Supp. 2d 491, 497 (S.D. N.Y. 2008).

As the court explained in *NRDC v. EPA*, in granting summary judgment for NRDC on the question of an FOIA fee waiver, an understanding of how a federal agency makes policy decisions touches on "an issue of the utmost importance" and fee waivers for requests seeking information tending to facilitate such an understanding should be approved. 581 F. Supp. 2d 491, 498-499 (S.D. N.Y. 2008) (citing *Forest Guardians v. United States Dep't of Interior*, 416 F.3d 1173, 1179 (10th Cir. 2005)).

As amended in 2007, the FOIA allows that a "person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into

a distinct work, and distributes that work to an audience” is entitled to a fee waiver. 5 U.S.C. § 552(a)(4)(A)(ii). Such distribution can be in electronic form and can use alternative media. *Id.*

The District of Columbia Circuit Court reversed a finding by the Federal Trade Commission and the district court and held that the non-profit organization, Cause of Action, qualified as a representative of the news media under the FOIA, so that FOIA document recovery fees must be waived. The Court explained that the nature of the requester, without more, would satisfy the requirements for a fee waiver, if the following criteria were met and the records were not sought for commercial use: A requester must: (1) gather information of potential interest (2) to a segment of the public; (3) use its editorial skills to turn the raw materials into a distinct work; and (4) distribute that work (5) to an audience. *Cause of Action v. FTC*, 799 F.3d at 1120 (citing 5 U.S.C. § 552(a)(4)(A)(ii)).

The Court explained, “A substantive press release or editorial comment can be a distinct work based on the underlying material, just as a newspaper article about the same documents would be -- and its composition can involve ‘a significant degree of editorial discretion.’” *Cause of Action v. FTC*, 799 F.3d at 1122 (quoting *National Security Archive v. Dep’t of Defense*, 880 F. 2d 1381, 1387 (D. C. Cir. 1989)). In addition, “posting content to a public website can qualify as a means of distributing it – notwithstanding that readers have to affirmatively access the content.” *Id.* at 1123.

Factor 4. The significance of the contribution to public understanding: The disclosure of records requested by WaterLegacy is likely to contribute significantly to public understanding of government operations or activities. The Minnesota public currently has little information or understanding of the subject in question, and WaterLegacy intends to use information obtained through various sources, including these FOIA requests to EPA, to engage the community and enhance their understanding of MPCA class 3 and class 4 water quality standards amendment issues. *See also* response regarding Factor 3.

Factor 5. The existence and magnitude of a commercial interest: WaterLegacy has no commercial interests that would be furthered by the requested disclosure. WaterLegacy is a 501(c)(3) non-profit organization and has no commercial interests at all.

Factor 6. The primary interest in disclosure: WaterLegacy seeks the requested records solely in the public interest to secure and share information as to the government’s role and provide accountability consistent with the purposes of the FOIA.

The purpose of the FOIA is undisputed. The Act is intended to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *Nat’l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978.)

As summarized in *Pub. Employees for Envt’l Responsibility v. United States Envt’l Prot. Agency*, 314 F. Supp. 3d 68, 73 (D. D.C. 2018):

The FOIA provides “a means for citizens to know ‘what their Government is up to,’” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171, 124 S. Ct. 1570, 158 L. Ed. 2d 319 (2004) (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989)), and was enacted “to promote the ‘broad disclosure of Government records’ by generally requiring federal agencies to make their records available to the public on request,” *DiBacco v. U.S. Army*, 795 F.3d 178, 183, 417 U.S. App. D.C. 441 (D.C. Cir. 2015) (quoting *United States DOJ v. Julian*, 486 U.S. 1, 8, 108 S. Ct. 1606, 100 L. Ed. 2d 1 (1988)); *see also Dep’t of Air Force v. Rose*, 425 U.S. 352, 361, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976) (noting “the basic policy that disclosure, not secrecy, is the dominant objective of the Act”).

The MPCA has noticed this matter for rulemaking. EPA’s prompt response to this request would be greatly appreciated. If certain portions of the requests in paragraphs A, B, and C are more readily available, we would appreciate immediate receipt of the more readily available information. Please feel free to contact me with any questions or explanations at pmaccabee@justchangelaw.com or 651-646-8890.

Sincerely yours,

/s/ Paula G. Maccabee

Paula G. Maccabee
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